Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1997

LAFAYETTE MOREHOUSE INC.,
a California corporation,
HUMORE INC., a California corporation,
THE PRIVATE SECTOR, a California corporation,
ALEXANDER VAN SINDEREN,
JACQUELINE VAN SINDEREN,
VICTOR W. BARANCO, TOM WAGNER,
LILYAN BINDER, ROBERT KERR
and DOES 1-50,

Petitioners,

vs.

COUNTY OF CONTRA COSTA,
a political subdivision of the State of California,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal
of the State of California, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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MAPP

QUESTIONS PRESENTED

I

WHETHER THE CALIFORNIA COURT OF APPEAL'S DECISION AFFIRMING THAT "VAGUENESS" IS THE STANDARD IN THE CONSTRUCTION AND APPLICATION OF THE COUNTY ZONING ORDINANCE VIOLATES DEFENDANTS' RIGHT TO USE THEIR PROPERTY AND DUE PROCESS GUARANTEES BY PROHIBITING EVERYTHING IN A RESIDENTIAL ZONE WHICH IS NOT "NORMAL" ?

II

WHETHER THE CALIFORNIA COURT OF APPEAL'S DECISION DENIES DEFENDANTS EQUAL PROTECTION OF THE LAWS BY UPHOLDING A CONSTRUCTION AND ENFORCEMENT OF A ZONING ORDINANCE WHICH PROHIBITS A USE FOR HUMAN SURVIVAL WHICH WOULD BE ALLOWED FOR RECREATION OR THE KEEPING OF LIVESTOCK ?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray this Honorale Court for a Writ of Certiorari to review the Judgment of the Court of Appeal of the State of California, First Appellate District, in this cause, review of which was denied by the California Supreme Court.

OPINION BELOW

On May 30, 1996 the Court of Appeal of the State of California, First Appellate District, No.AO68505 (Appendix B infra) issued it's opinion affirming in part and reversing in part the Judgment of the Superior Court of California County of Contra Costa Hon. Robert G. McGrath presiding entered in Case No. C92 05522 on November 7, 1994. (Appendix C infra).

JURISDICTION

The Supreme Court of California's Order denying Petitioner's Petition for Leave to Appeal from the Court of Appeals decision was filed August 21, 1996. (See Appendix A) This Court has jurisdiction to review the California Court of Appeal's decision by Writ of Certiorari pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of the following provisions:

Amendment I to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.
Amendment IV to the United States Constitution:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX to the United States Constitution:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X to the United States Constitution:

The power not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.

Amendment XIV to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

THE DECISION BELOW:

Defendants-Petitioners petitioned the California Supreme Court for review of the decision of the Court of Appeal of the State of California, First Appellate District, Division Four, filed in this action on May 30, 1996. See Appendix B. Review by this Court is

necessary on the grounds that the decision of the Court of Appeal is not in line with the authorities of this Court cited herein and that imortant and novel questions of law which require settlement by this Court.

FACTUAL AND PROCEDURAL BACKGROUND:

The subject property named in the complaint consists of six contiguous parcels in an unincorporated area of Contra Costa County (hereinafter, County). The property is owned by Humor Inc., a closely held corporation, with some of the parcels subject to a reserved life estate by Victor W. Baranco. Lafayette Morehouse Inc. is the lessee of the property. At all relevant times in this action, one parcel was subject to a conditional sales contract. From the acquisition of the first parcel in August of 1970, the residents of the property have lived as a non-nuclear group, in which every resident has ~~a~~ no-vote over any proposed action involving the group. (AA at 36-39; RT at 565.) [Throughout this Petition, the following abbreviations are used: "AA" is the Appellants' Appendix; "RT" is the Reporter's Transcript.] The immediate geographic area surrounding the subject property was initially an area of open space with only few dwellings which were not visible to the subject property. Over time, subdivisions built to accommodate nuclear families have crowded the borders until the subject property has become part of an island of open space engulfed by an ever-increasing dense urban area. (AA at 37.)

The residents of the subject property live there as a private group of people in a residential environment akin to a monastery which takes in travelers and other people without means and gives them refuge and comfort. An integral part of this lifestyle is to celebrate their own abundance and fulfillment of the American dream by giving of their surplus to the less fortunate citizens of the County. Accordingly, Petitioner's have invited homeless onto their property as their guests in an effort to help these people get their basic survival goals and rejoin society. (AA at 37,38.) Since the

beginning and continuing until the present, the residents of the property in question have opened the property to homeless men, women and children. Homelessness has become a pervasive national problem which has been especially extreme in the Bay Area since the mid-1980's. Indeed, the tria judge took judicial notice of the severe crisis of homelessness in the nation and the County and the lack of any available shelter for a significant segment of the population. (RT 29 30.)

Petitioner's fellow citizens, the homeless men, women and children of the County, having no other realistic option, have resorted to living in public places, in the streets, in cars and under viaducts. Finding this condition intolerable and exercising their liberty of conscience and share their surplus, the individuals living on the subject property opened their home to these neighbors as guests. Representatives of the Respondent-County, particularly deputy sheriffs, have brought homeless people there. (RT at 536-7.) Petitioner's use has thus been the normal use of the property preceding the current zoning ordinance for nearly twenty-five years. (AA at 36-39.)

NATURE OF THE ACTION & RELIEF SOUGHT:

The Respondent sought injunctive and declaratory relief against Petitioners for alleged violations of it's zoning ordinance for permitting homeless persons, primarily women and children, from seeking refuge on lands owned by Humore, Inc. (AA at 1-11.)

For its First Cause of Action, County sought preliminary and permanent mandatory injunctions against nine defendants alleging many zoning violations on six parcels of land in an unincorporated area of the County which is zoned single family residential (R-10 and R-20) under Contra Costa County Ordinance Code sections 84-8.402 and 84-14.402. These zoning allegations included maintaining tents on a continuing basis for human habitation and sleeping purposes; maintaining multiple dwelling units; maintaining

non-accessory shelters; conversion of single-family residential dwelling to dining commons; maintaining food packaging, warehousing and distribution center and structures for same; maintaining junkyards, a storage yard, contractor's yard, and abandoned vehicles, vehicle parts and debris.

For its Second Cause of Action, County sought preliminary and permanent injunctions to enjoin a "public nuisance". The County never applied for a preliminary injunction. The trial for permanent injunction was held May 24, 1994 through June 1, 1994.

For its Third Cause of Action, County sought a judicial determination of its rights and duties and a declaration as to whether defendants must comply with all applicable County zoning ordinances and, if so, that defendants are and have been in violation of said ordinances during the past twelve months.

JUDGMENT OF THE SUPERIOR COURT:

Respondent County presented no evidence at trial regarding most of the allegations and defendants, and judgment was granted in favor of seven defendants and all but two of the alleged zoning violations at the conclusion of plaintiff's case pursuant to Code of Civ. Proc. section 631.8. The remaining defendants were Humore Inc. and Victor W. Baranco, the appellants in the state appeal; the remaining zoning issues were the allegations of tents on four parcels and an alleged junkyard on another parcel. (RT at 472-473.)

The Superior Court issued its tentative decision on August 12, 1994 followed by a judgment entered on November 7, 1994, in which the court found that the evidence failed to establish the maintenance of a "junkyard" on the subject property. The trial court further found that portions of the subject property are being occupied by individuals living in tents on a continuing basis and that an injunction would issue prohibiting defendants from allowing individuals to live on a continuing basis in tents on the subject

property. The court further found "that the maintenance of tents for such a purpose within a R-10 or R-20 District is a violation of the Contra Costa code and therefore [sic] a "public nuisance." (AA at 202-205.)

The Superior Court's tentative decision was adopted as its statement of decision, and judgment was entered enjoining Humore Inc. and Victor W. Baranco from allowing individuals to live on a continuing basis in tents on four parcels of the subject property and dismissing all other defendants and allegations. These four parcels are identified by the following assessor's parcel numbers: APN's 169 190-004, 169-190-007, 169-200-003 and 169-200 001. (AA at 209-212.)

DECISION OF THE COURT OF APPEAL

Humore Inc. and Victor Baranco appealed from the injunction issued by the trial court against "the maintenance of tents for living purposes" within a residential zone. The county cross-appealed from the judgment dismissing certain defendants pursuant to code of Civil Procedure section 631.8 and from the trial court's rulings on the validity of the administrative inspection warrant and supporting affidavit.

The Court of Appeal affirmed the judgment of permanent injunction as to three of the four parcels and reversed the judgment dismissing four other defendants and also reversed the trial court's rulings regarding the inspection warrant and the exclusion of the evidence obtained through the dragnet search of the property. (See Court of Appeal's Decision at Appendix B.)

REASON FOR GRANTING THE WRIT

I. THE COURT OF APPEAL'S DECISION AFFIRMING THAT "VAGUENESS" IS THE STANDARD IN THE CONSTRUCTION AND APPLICATION OF THE COUNTY ZONING ORDINANCE VIOLATES DEFENDANTS' RIGHT TO USE THEIR PROPERTY AND DUE PROCESS GUARANTEES BY PROHIBITING EVERYTHING IN A RESIDENTIAL ZONE WHICH IS NOT "NORMAL".

This court is urges to examine whether Petitioner's have the deeply personal right to put their surplus property to its and true highest and best by opening their home as a sanctuary to neighbors who in distress who have nowhere else to go.

The parcels at issue are zoned single-family residential in either R-10 or R-20 districts, which among the expressly permitted uses provide for a "detached single family dwelling on each lot and the accessory structures and uses normally auxiliary to it." (Emphasis added.) In order to determine what is meant as a "single-family" for purposes of this ordinance, the Contra Costa County Ordinance Code provides a definition of "family" as an:

"Individual; or two or more persons related by blood, marriage, or legal adoption; or a group of not more than five persons, excluding servants, who are not related by blood, marriage or legal adoption, living together, as a single non-profit housekeeping unit in a dwelling unit as distinguished from a hotel, club, fraternity or sorority house, dormitory or boarding house. A family includes necessary servants." (County Ord. Code, Section 82 4.236.)

However, this is essentially identical to the zoning definition which was declared unconstitutional by California Supreme Court as violative of the right of privacy contained in the California Constitution in City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 134 (1980). Critically, the County's Code has not been amended to honor and implement this ruling, and therefore the enforcement of

the zoning code still reflects the pre-Adamson bias against groups in favor of the so called nuclear family comprised of persons related only by "blood, marriage, or legal adoption." in this context, it is clear that the County herein has inappropriately enforced its ordinance according to a legally outdated subjective undefined and standardless, but expedient, subjective and indefinite notion of nuclear family "normalcy".

After acknowledging this Court's pronouncement in Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) a that law is overbroad if it reaches constitutionally protected conduct the Court of Appeal ignored precedent and summarily concluded that the subject ordinances ". . . as construed by the court below and by this court are within the County's police power and do not invade Owners' substantial rights. There is no overbreadth problem." It justified it's holding by simply stating "a substantial amount of vagueness is permitted in California zoning ordinances" because of "the need of government in large urban areas to delegate discretionary power to administrative bodies if the community's zoning business is to be done without paralyzing the legislative process." (Exhibit A, p. 6.) Thus, the Court of Appeal exempted the governments of California from the due process protections of our Constitution and the Bill of Rights and rejects of the clear precedent of this Court because to do so would undermine indefiniteness and therefore not be in the interests of bureaucratic expediency and unbridled discretion. This philosophy is at odds with that of this Court where an ordinance is overly broad or delegates overly broad discretion and impermissible risk of the suppression of ideas a substantial amount of constitutional liberty. See: Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, (1992).

In Grayned v. City of Rockford, 408 U.S. 104 at108 this Court held:

. . . It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.

Vague laws offend several important values. First, because we assume a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. (Footnotes omitted). (Emphasis supplied)

An ordinance which delegates the power to determine the standards for enforcement in the hands of governmental officials is unconstitutional on its face. Forsyth County Georgia v. The Nationalist Movement, 505 U.S. 123, 131 (1992); Niemotoko v. Maryland, 340 U.S. 268, (1951). This Court has long held that any ordinance which allows a governmental bureaucrat absolute discretion without a guiding standard is facially unconstitutional despite their claims that complying with the constitution is too troublesome or that it will prevent ad hoc and subjective treatment of the populous:

"This presumes the mayor will act in good faith and adhere to standards absent from an ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. See Freeman v. Maryland, 380 U.S. 51 (1965). The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well established practice. Poulos v.

New Hampshire, 345 U.S. 395 (1953); Kunz v. New York, 340 U.S. 290 (1951). This Court will not write non-binding limits into a silent state statute." (City of Lakewood v. Plain Dealer Publishing Co., (1988) 486 U.S. 750, 770.)

This court has noted that constitutional infirmity lies in the vagueness of the concept of common law nuisance itself. See: Miller v. California, 413 U.S.15, 23 25, (1973). Moreover, [a] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose." Nollan v. California Coastal Comm., 483 U.S. 825, 834 (1987). No such legitimate government interest or purpose has been advanced or demonstrated in the case at bar.

These due process principles ring especially true in zoning law where, without standards, the local government can determine the core of an owner's property value and the contours of its use through, in this case, a subjective bureaucratic interpretation of what is "normal." The evidence herein shows that zoning inspector Ronald Jackson, County Administrator Phil Batchelor and Assistant County Administrator John Gregory agree that there is no prohibition in the County Code against tents in a residential zone. (AA at 125, 127-128.) Dennis Barry, the Deputy Director for the Contra Costa County Department of Community Development, testified that there is no definition or standard for what is "normal" under the County Code. (RT at 169-170.) Mr. Barry also testified that tents are permitted for a variety of purposes (RT at 77-80.), but would sometimes require a special permit, although there are no definitions or standards to govern such permits or to specify when they are required. (RT at 123-125.) Mr. Barry also testified that interpretation of the zoning ordinance is ultimately a matter of his "sole discretion." (RT at 148-149.) Zoning inspector Jim Hall's draconian interpretation was that any tents, even children's pup tents in backyards or tents for weddings, outdoor parties, or festivals are illegal anywhere in the County except the T-1 trailer park district. (RT at 290-291.)

Thus, a reasonable person of common intelligence cannot know what is permitted or prohibited when the County's enforcement officers disagree. It is well settled that: "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." Sechrist v. Municipal Court, 64 Cal. App. 3d 737, 745 (1976), quoting Connally v. General Const. Co., 269 U.S. 385 (1930). See also: Broadrick v. Oklahoma, 413 U.S. 601, (1973).

How can a person of common intelligence know what is permitted in the Code if the unconstitutional definition of "family" remains on the books as the touch stone of what is "normal" in Contra Costa County? An ordinary person would have to be familiar with the court decisions to know and the subjective idiosyncracies of each and every bureaucrat in Contra Costa County what, if anything, is permitted. Due process requires the acts proscribed must be clear. Under such circumstances "The Constitution imposes on this Court the obligation to examine carefully . . . the extent to which [the legitimate government interests advanced] are served by the challenged regulation.'" See: Cruzan v. Director, Missouri Dept of Health, 497 U.S. 261 at 303 (1990) (Brennan, J., dissenting, quoting Moore v. East Cleveland, supra at 499).

The County ordinance regulating uses according to "normalcy" without any definition or standard to govern the interpretation of that concept does not clarify what acts are proscribed as required by due process. Moreover, the vague and undefined concept of "normal" was greatly expanded by in City of Santa Barbara v. Adamson, supra, at 27 Cal. 3d 123. The County has chosen not to adapt to Adamson by amending its outdated non-conforming ordinance which still contains the five unrelated people standard of "normality". Adamson held that a group could live together without regard to the number of people in a single-family zone. (Id.

residential zones but who managed to escape the County's enforcement program. Again, Owners' quarrel is with the construction of the zoning laws, a construction that says the use of tents for continuing occupation is not an "accessory use" to a detached single-family dwelling, while the use of backyard tents for slumber parties, a wedding reception or an occasional overnight guest probably is. Second, despite Owners' efforts to make it so, this is not a case about lifestyle, conforming or nonconforming. It is about uses that are, and are not, accessory to single family homes in residential zones.

B. The Judgment for Injunctive Relief Was Properly Imposed and Supported by Substantial Evidence

Owners further urge that County did not make a clear showing of a zoning violation and that, without such a showing, the court could not apply the conclusive presumption that the violation resulted in an enjoinable public nuisance. Similarly, they argue~~that a "strong and urgent case" is needed to justify imposing a "mandatory '4 injunction, and County has not put forward such a case. (Quoting and citing Gardner v. Stroever (1889) 81 Cal. 148, 150.) Owners also complain that the court did not consider the interests and rights of unnamed third parties who "may own and inhabit" the tents.

4 Owners are analyzing the injunction as "mandatory" in nature because in order to comply with its terms, they must remove the tents.

First, contrary to Owners' assertion, there was ample evidence that since 1992, tents were maintained on the

property and that people were living in these tents on a continuous basis.5

Second, what Owners fail to acknowledge with respect to mandatory nature of the injunction is that we are dealing with a legislatively declared nuisance. "Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant. The function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid." (City of Bakersfield v. Miller (1966) 64 Cal.2d 93, 100.)

Third, the people inhabiting the tents have no right to occupancy of the properties in question and, thus, there are no third party rights to adjudicate. We are very mindful that the homeless have interests that could be disturbed by enforcement of the injunction. However, Owners have chosen to pursue their social interest in providing for the homeless without regard to the mandates of the zoning ordinance. For example, certain special uses, including "eleemosynary" institutions, as well as additional detached dwellings (within defined density restrictions) are allowed in District 20, "on issuance of a land use permit." (County Ord. Code, §§ 84-14.404, 84-4.404.) Owners could have, but chose not to, pursue a permit application for maintenance of tent structures for the homeless.

5 The injunction went to four parcels. Testimony revealed that in recent months, all tents had been

removed from parcel 169190-004. However, given the history of maintaining tents as residences on that and other parcels, a history that in fact dated back years prior to 1992, the court properly included parcel 169-190-004. We do agree with Owners that there was no substantial evidence of tents on parcel 169-200-001 and, accordingly, the judgment must be reversed as to that parcel. The testimony revealed merely that there the there was a tent "in the area up around 168-200-001 and 169-200-003 on a ridgeline," but that it was difficult to ascertain the exact location of the tent.

C. Owners' Equitable Arguments Are Not Persuasive

Owners also press that the court should have sustained their affirmative defenses of unclean hands, laches and balancing of equities. Not so.

The "unclean" conduct of which Owners complain is twofold: (1) obtaining an allegedly illegal inspection warrant, and (2) interpreting the zoning ordinance in a manner that is allegedly incompatible with the general plan and laws that require adequate provision for the housing needs of all segments of the community. Owners have not shown, nor do we find, the proof of scienter or bad faith in either alleged wrong. In ruling on the suppression motion, the court specifically commented that it was "not suggesting that anyone intentionally withheld information or that any one was intentionally being dishonest." Further, Owners have not proven any incompatibility with the County's general plan and in any event a legal determination of incompatibility would not translate into bad faith on the part of the enforcers of the zoning ordinance.

The defense of laches is equally unavailing. By Owners' own admissions, the zoning violations have been continuous for years. However, the disruption to the surrounding community became manifest to the County in 1992 with the receipt of a number of complaints. County did not "sleep on its rights" when the violations came to its attention. Rather, it proceeded in a timely fashion to investigate and prosecute the violations.

Finally, and again, with a public nuisance the equities and hardships are for all practical purposes balanced in general in advance by the legislative body and are not reevaluated by the court.

Owners' Were Properly Enjoined

Finally, Owners complain that it is futile to enjoin them because possession and control of the property, except for parcel 169- 190-004, is in the hands of Morehouse, as lessee. As to parcel 169-190-004, Humore, Inc., apparently had entered into a contract of sale with another corporation.

Owners claim that a landlord is not responsible for a nuisance maintained on premises by the tenant, where the lease is otherwise for a lawful and proper purpose (citing Anderson v. Souza (1952) 38 Cal.2d 825, 831). How, then, could "naked title holders" be held accountable under an injunction against maintaining or erecting tents for occupancy on the property?

It is important to examine the exact holding of Anderson: "[A] landlord is not responsible to other

parties for the misconduct or injurious acts of his tenant to whom his estate has been leased for a lawful and proper purpose when there is no nuisance or illegal structure upon it at the time of the leasing." (Anderson v. Sousa, supra, 3 8 Cal.2d at p. 831, Italics added. No one disputes that Owners have always had knowledge of the existence and continuous occupancy of tents on the property. Indeed, Van Sinderen and Binder are of officers of Humore, Inc., as well as members of the community that made the decision to invite homeless people to the property and allow them to live in tents. The express purpose of Humore, Inc., is to hold the property for the convenience of the members of Morehouse who reside there. Baranco at one time shared title to all the property, currently retains an interest in the property, is an employee of Morehouse and has shared in the philosophy of the community residing thereat.6

6 Victor Baranco spends most of his time in Hawaii. At the time of trial he was unable to travel because he was recuperating from an illness.

"[A]ll parties to a nuisance per se, he who creates it and he who maintains it, are responsible for its effect, without limitations of condition or time." (McClatchy v. Laguna Lands Limited, supra, 32 Cal.App. at p. 725.) The court correctly found that "[n]either the existence of a lease nor a conditional sales contract for portions of the subject property will prevent the issuance of an injunction since the evidence has established that the defendants have always been aware of the existence and purpose of the tents. In addition, the evidence has disclosed that the maintenance of the tents for living purposes has been encouraged by the defendants." We

concur.

III. COUNTY'S APPEAL

A. The Court Erred in Dismissing Certain Defendants

At the close of County's case, defendants moved for judgment pursuant to section 631.8, arguing that there was no testimony connecting them in any meaningful way to the property. During argument on the motion, County relied on Exhibit 7 which contained certified copies of the deeds and "corporate records" identifying "who owns those corporations." The court asked counsel for County to show where, in exhibit 7, there was any connection between Morehouse, The Private Sector, Inc., and the various individual defendants. After a 10-minute break, counsel stated he was unable to find documentation providing the crucial connection, even though his co-counsel had previously stated that there were documents "along this line" in the court's file. The court granted the motion as to all defendants except Owners.

County now argues that the trial court erred in dismissing Morehouse, The Private Sector, Inc., Alexander and Jacqueline Van Sinderen, and Lilyan Binder. The court Concluded there was no evidence before it that these defendants had any interest in, or control over, the property. County argues that this finding is not supported by any substantial evidence. When, as here, the section 631.8 motion for judgment is granted (in part), we review the judgment under the substantial evidence rule. (Heap v. General Motors Corp. (1977) 66 Cal.App.3d 824, 830.)

ordinances directed against defendants which is prima facie discriminatory and invalid under the Equal Protection Clause. The County takes the position that any use of land which is not expressly permitted by the zoning code is prohibited. (C.C.C. Ord. Code Section 82-2.006.) The permitted uses are phrased in a subjective term such as "normal," a concept which can no longer be confined only to the nuclear family comprised of a father, mother and children. Adamson, supra, 27 Cal. 3d at 128.; Moore, supra 431 U.S. at 504.

Many County residents would consider sleeping tent in their backyard for use by their children or others a "normal" use. Unfortunately, for the homeless sleeping in the open or make shift tents is for them all too "normal". The County admittedly condones camping on public camp grounds under it's control with no permit, but "sometimes" arbitrarily prohibits such camping on private property even with the acquiescence or express permission of those having control or ownership of such property. It is admitted that no expressed prohibition against such tents exists or has ever existed in the zoning ordinance in question. Yet, the County administrators arbitrarily construe the use of such tents on the subject property as outside their subjective scope of what is "normal" and therefore prohibited even though no law exists on the subject. The County's position, affirmed by the Court of Appeal, seems to be that a use is "normal" if it has a recreational purpose, but not "normal" and therefore barred and subject to fine if it has survival as a purpose. Ironically, the County's heartless policy and practice is diametrically opposed state's interest ordinarily involves the prolongation of human life as an interest is ". . . very high when 'human life [can] be saved . . . ." See Superintendent of Belchertown State School v. Saikewicz, 373 Mass 728, 742; 370 N.E.2d 417 (1977).

1. THE FUNDAMENTAL RIGHT TO PRIVACY

The right to privacy was established as a "fundamental interest" in Roe v. Wade, supra. The restrictive enforcement of County's

zoning ordinances violates defendants' deeply personal right to privacy in the enjoyment and sharing, wthout governmental interference, the best and highest use of their property by allowing their homeless neighbors to rest and find sanctuary on their surplus lands as guests.

2. THE FUNDAMENTAL RIGHT OF ASSOCIATION WITH THE HOMELESS

Defendants maintain that they have a constitutional right to pursue their lawful private interests and to associate freely with anyone whom they choose, such as their homeless neighbors free from bureaucratic intrusion under the protection of the Fourteenth Amendment. See: NAACP v. Alabama, 357 U.S. 449, 460 1 (1958). No law prohibits engaging in their chosen and long established lifestyle, rather than a "nuclear" family lifestyle. Their acts of generosity poses no threat to the community. Indeed, their allowing their homeless neighbors to utilize their lands and feeding them were lauded by the trial judge. (AA at 203.)

3. NONCONFORMITY

A classification based upon nonconformity is recognized as "suspect" for equal protection purposes. In Parr v. Municipal Court, 3 Cal. 3d 861 (1971), the California Supreme Court, citing decisions of this Court, struck down a Carmel city ordinance which prohibited sitting, walking, and standing on public property in certain city areas. Although the language of the ordinance was neutral on its face, the Carmel City Council had attached a "Declaration of Urgency" indicating that the ordinance was directed against "undesirables and unsanitary visitors to the city, sometimes known as 'hippies'." The Court, finding the ordinance violative of equal protection principles, observed:

"[We] cannot be oblivious to the transparent, indeed the vowed purpose and inevitable effect of the ordinance in question: to

discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than color." (Id. at 870.)

Precisely because the County has failed to address the problems of Petitioner's homeless guests innovative domestic experiments must be afforded the same protection extended "hippies," making harassment of the nonconformists "suspect." Discriminatory selective enforcement of ordinances against defendants and their guests constitutes harassment for their nonconformity in the use of their property. The Petitioner's respectfully submit that, at a minimum, they should be constitutionally protected so as to alleviate suffering that the Respondent has chosen to no only ignore but effectively outlaw though it's manipulative interpretation and selective and subjective enforcement of it's limitless self delegation of unbridled power.

For the above reasons, the County Code and this enforcement action are unconstitutional on their face and as applied.

III. THE CALIFORNIA COURT OF APPEAL'S DECISION REVERSING THE TRIAL COURT'S RULING QUASHING AN ADMINISTRATIVE INSPECTION WARRANT AND SUPPORTING AFFIDAVIT VIOLATES DEFENDANTS' FOURTH AMENDMENT RIGHTS AND UPHOLDS AN EGREGIOUS INTRUSION INTO THE PRIVACY OF PETITIONERS' HOME.

On May 10, 1994, the defendants in this cause filed their motion in *limine* requesting exclusion of all evidence acquired through the County's inspection of the subject property on October 15, 1992. (AA 88-99.) The County filed no response to defendants' motion in *limine*. On this ground alone, the trial court could grant defendants' motion, and this could sustain the exclusion of evidence. The motion in *limine* was based upon the grounds that

the inspection warrant was not issued upon probable cause, the *ex parte* warrant denied defendants' right to due process, the affidavit lacked particularly, there was no required request to inspect the premises located at APN 169-200-001, and that the inspection exceeded the scope of the warrant. (Ibid.) During the trial, the trial court granted the motion in part and denied it in part, excluding any items found in structures other than tents. (RT 246-249.) Further in the trial, the trial judge excluded the remainder of the evidence obtained during the search because the affidavit supporting the inspection warrant had omitted a material fact, i.e., that there had previously been a consensual inspection of the subject property by the County in the same year. (RT 298-326.) Defendants submit the folloing arguments which demonstrate that the exclusion of all such evidence by the trial court was correct.

1. The Trial Court Ruled Correctly On Defendants' Motion in *Limine* and the Court of Appeals sanctioned unconstitutional searches by reversing it's ruling.

This Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. See v. City of Seattle, 387 U.S. 541 (1967). The expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. See: Donovan v. Dewey, 452 U.S. 594 (1981).

An inspection warrant issued in a situation where there are possible penal consequences must be based upon probable cause to comply with search and seizure requirements of the Fourth Amendment to the United States Constitution and Article I, Section 13 of the California Constitution. Salwasser Mfg. Co. Municipal Court for Fresno Judicial District, 94 Cal. App. 3d 223, 234 (1979). See: Michigan v. Tyler, 98 S.Ct. 1942, (1978)(under the fourth amendment there exists no authority for governmental inspections of residential premises without a proper warrant). In

recognition of these principles, Code of Civil Procedure, Section 1822.51 was amended in 1984 to add to the prior "cause" standard for the issuance of an inspection warrant the provision that "[a]n inspection warrant shall be issued upon cause, unless some other provision of state or federal law makes another standard applicable." (Emphasis added.) This amendment was accompanied by this legislative finding: ". . . nothing in this act shall be construed attempting to modify any requirement in existing law that a particular warrant be issued only on a showing of probable cause." Criminal penalties are provided for violation of the County zoning ordinances in County Ordinance Code Chapter 14-8. Moreover, there was admittedly no need for quick action as would be necessary to eradicate animal or plant pests. Consequently, it is clear that the warrant issued to inspect the subject property prior to the filing of this action should only have been issued upon probable cause.

The administrative probable cause requirement "is met by showing of specific evidence sufficient to support a reasonable suspicion of violation." Salwasser Manufacturing Co. v. Occupational Safety & Health Appeals Bd., 214 Cal. App. 3d 625, 631 (1989). The affidavit offered in support of the issuance of this plenary warrant failed to present specific evidence to justify the general search authorized by the warrant. This affidavit speaks almost entirely of tents. (See Appendix to County's Responding and Appellants' Opening Brief.) Based upon a description of tents, the warrant commanded a search of entire premises," including the various tents and structures on the property. . . ." Code of Civil Procedure section 1822.51 provides that "[a]n inspection warrant shall be supported by an affidavit, particularly describing the place, dwelling, structure, premises or vehicle to be inspected and the purpose for which the inspection is made." Particularity of description is also required by the Fourth Amendment and Article I, Section 13 of the California Constitution.

The affidavit of Jim Hall, the County's inspector, only describes his observations of tents, (facts which were already

known before and since the prior inspection) and even these are not identified with respect to any particular parcel. The overly broad warrant authorized inspection of the entire premises, identified by addresses, "including the various tents and structures on the property." (Warrant p. 2.) There is no reference to any particular structure by a witness "supported by oath or affirmation," as required by the Fourth Amendment and Article I, Section 13 of the California Constitution.

The trial court, which was in the position to evaluate credibility and the evidence, correctly held that the allegations of the affidavit by zoning inspector Jim Hall relating to conditions other than tents were too vague and insufficient. (RT 247-248.) For example, the trial court found the allegation of item 11 of the affidavit, i.e., that a single family dwelling has been converted to a food storage and distribution operation, is vague and inconclusive, pointing out that "food could be stored in a dwelling and distributed occasionally without being in violation of the code." (RT 247.)

The affidavit relied upon unspecified and vague "complaints" of neighbors. However, none of these neighbors were identified, nor was any factual basis for their conclusions of zoning "violations" stated, which, contrary to the decision of the Court of Appeal, raised questions and doubts as to their reliability. In item six of the affidavit, it is stated that Tom Wagner, one of the Petitioners, allegedly said that The Private Sector, another Petitioner, "is a non-profit organization which assists homeless people and people in need.... [and is] 'a sanctuary program that provides shelter and meals at no cost to people.'" (Affidavit p. 3.) There is no allegation that this sanctuary program was even operated on or located upon the subject property, and therefore this allegation is meaningless and can provide no basis for the issuance of a warrant. The Court of Appeal relies on a notion that such use of the subject property was implied in the affidavit. Probable cause must be established by a much stronger showing than "implication." Inconsistently, the Court of Appeal speaks of the Private Sector's "mission" on the

subject property and yet affirmed its dismissal of said defendant for lack of evidence.

The Court of Appeal speaks of "the totality of the circumstances" as justifying the affidavit. (Exhibit A, p. 19.) However, those providing hearsay information in the County's affidavit are unidentified, with no factual basis given for their conclusions. There is no way to determine the veracity of these anonymous informants. It is this lack of the "totality of the circumstances" which led the trial court to the practical, common sense decision that the warrant was too broad to justify the general search of the premises which occurred on October 15, 1992. The trial court was clearly correct in granting defendants' motion in limine to the extent of "excluding any items that are found inside of structures other than a tent." (RT 248.)

There was no identification in the affidavit of the source or reliability of the alleged complaints of "zoning violations." The affiant's attempt to corroborate the above allegation by further alleging "I observed large numbers of boxes and containers which appeared to be food packing crates and containers" was correctly held by the trial court to be "insufficient to corroborate the statement and to allow one to believe that food storage and distribution operation is going on and that single family dwellings have been converted to that use." (RT 248.) The trial court correctly held such allegations "too vague and too general to justify a warrant."

2. The Omission From The Affidavit Of The Recent Zoning Inspection By A County Team From The Building, Zoning and Health Departments Required That The Warrant Be Quashed And All Evidence Obtained Thereby Be Excluded.

After the trial court had limited the scope of the warrant to the inspection of tents to determine whether people were living in them, the court learned that there previously had been a joint inspection of

the same property by a County team from the Building, Zoning and Health Departments who examined the tents and determined that such use of tents did not violate County ordinances. (RT 298-326.)

An affiant has a duty to disclose "material" adverse facts, which, if omitted, would distort the probable cause analysis. People v. Kurland, 28 Cal. 3d 376, 384, 385 (1980). "A fact is material if its 'omission would make the affidavit substantially misleading.' [Citation.] That is, the omission is material if 'there is a substantial possibility [that its inclusion] would have altered reasonable magistrate's probable cause determination.' [Citation.] People v. Easley, 34 Cal. 3d 858, 871 (1983), italics in original, citing People v. Kurland, supra, 28 Cal. 3d 385. When material fact is omitted from the affidavit the entire affidavit is rendered suspect, the judicial process is undermined, and hence the warrant must be quashed. People v. Kurland, supra, 28 Cal.3d 390.

To justify its result, the Court of Appeal held that "the civil defendant must show more than mere negligence of the affiant in attacking a facially valid administrative warrant. (Exhibit A, p. 23.) However, the trial court did not make finding that the omission was negligent, but merely refrained from a finding "that anyone intentionally withheld information or that anyone was intentionally being dishonest." (RT at 325.) In fact the issue of the affiant's motive in omitting the fact of the prior inspection was not determined by the trial court.

A finding of intentional or reckless conduct, on the part of the affiant would have been justified from the undisputed evidence. The primary reason given in the affidavit for the issuance of the warrant was that "I [the affiant Jim Hall] believe that an inspection of the interior of the tents will reveal that people are actually living and sleeping in the tents...." (County's Responding and Opening Brief, Appendix, Affidavit par. 14.) Yet, there is no dispute that the County already knew, from a prior consensual inspection of the property, that people were sleeping in tents. The Court of Appeal

held that omission of this preexisting knowledge of the specified object of the inspection "was immaterial." (Exhibit A, p. 20.) However, the authorities relied up by the Court of Appeal belie that conclusion. The Appellate decision noted that "reasonableness" is the ultimate test for determining probable cause.

This test involves balancing the need to search against the invasion which the search engenders." [Exhibit A, p. 19, citing Camera v. Municipal Court, 387 U.S. 523, 537, 539 (1967).] Moreover, "[t]he facts offered must be sufficient to warrant further investigation or testing." [Exhibit A, p. 20, citing Salwasser Manufacturing Co. v. Occupational Safety & Health Appeals Bd., 214 Cal. App. 3d 625, 631 (1989).]

The trial court correctly found that the County already had enough evidence from the prior inspection to file its complaint, and therefore no further intrusion was necessary. The County and the Court of Appeal deemed it significant that five or six months had elapsed after the prior search before the County applied for an inspection warrant to repeat the inspection. However, the intrusion of a general search was not made reasonable by the fact that the County delayed filing its complaint while it had the evidence to do so. Since all involved knew that tents were being used for sleeping purposes on the subject property, there could be no facts, and there were none offered, which were sufficient to warrant further intrusion of defendants' home for the purpose of determining that use."

The Court of Appeal acknowledged that even if the affiant is merely negligent, a finding that was not made in this case, "the accuracy of the probable cause analysis is at risk." (Exhibit A, p. 22.) The Court of Appeal held that in this situation the court "must strike a balance among several competing concerns," such as "practicality, accuracy and the policy of encouraging resort to the warrant process. . . , as well as the public interest in acting on a continuing violation or public nuisance. . . ." (Ibid.) Notably

absent from these "competing concerns" are defendants' constitutional rights to privacy and freedom from unwarranted intrusion into their property and personal lives which are guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 13 of the California Constitution. In contrast to the Court of Appears decision which it declined to review, the California Supreme Court has stated that '[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" Blair v. Pitchess, supra, 5 Cal. 3d 271. In addition: "It is a fundamental provision law that constitutional provisions should receive a liberal interpretation in favor of the citizen, especially in regard to those matters designed to safeguard liberty and security of person and property." 20 Cal. Jur. 3d (Rev) Section 2507, p. 458.

The inspection under warrant was clearly unnecessary and the intrusion into the expectation of privacy of the residents of the subject property was very great. The exclusion of all evidence obtained thereby was warranted and required: "In order to ascertain the nature of the proceedings intended by the Fourth Amendment under the terms' unreasonable searches and seizures,' it is only necessary to recall the. . . history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'" Boyd v. United States, 116 U.S. 616, 624-625 (1886).

On February 24, 1761, James Otis made his famous and historic argument to the Boston Court, urging the denial of these writs: "Otis reminded the judges that 'the freedom of one's house is

an essential liberty, that a man in his home must be as secure 'as a prince in his castle,' that a law which violates that privacy is an instrument of 'slavery' and 'villainy.' He showed how easy it was to get a writ: 'Bare suspicion without oath insufficient. . . . Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance. . . .' Otis lost. The writs he opposed were issued. But his speech -- one of the first public denunciations of Britain -- rallied public opinion. 'Then and there,' wrote John Adams, 'the child Independence was born.'" An Almanac of Liberty by William O. Douglas, 1954, Doubleday and Company, p. 247. These events and principles "were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." Boyd v. United States, supra, 116 U.S. 626-627. The protection of the Fourth Amendment extend to civil as well as criminal matters. (Blair v. Pitchess, 5 Cal. 3d 258, 271 (1971), citing Camara v. Municipal Court, supra, 387 U.S. 523; Weeks v. United States, 232 U.S. 383, 392 (1913).

As the Court in Boyd cautioned: "It may be that it is the obnoxious thing in its mildest and least repulsive form: but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments. Boyd, supra, 616 U.S. 635.

The County's actions in this case amount to nothing more than resurrected colonial writs of assistance. Such arbitrary invasion by government officials into cross respondents' privacy and security is

as pernicious as and is just the kind of conduct which it is the purpose of the Fourth Amendment to prevent. The facts of this case demonstrate that there is no limit to what will be sacrificed to obtain its desired result in the name of vagueness. If review of the California Court of Appeals is not had, due process will have been ignored, the Constitution itself will have been shrugged off as impractical and it's decision bearing the imprimatur in "certiorari denied" would stand as a blessing and license for even greater bureaucratic tyranny in the future. Even more tragic would be the message which could be interpreted as sent by a denial of this petition: our homeless fellow American's, whose interests ignored under the vague guise of bureaucratic expedience, amount to nothing more than a mere "nuisance" who are less worthy of harboring by the private sector than the livestock expressly permitted to be kept under the County's current zoning code.

This court must grant *certiorari* in this case to confirm and remind both our judiciary and our citizenry that above referenced principals of property rights, liberty and the privacy to be let alone and be free from fiat to enjoy and share the bounty of one's property. The are the cornerstones of the foundation of our nation, not bureaucratic convenience.

CONCLUSION

For all the reasons stated above, Petitioners respectfully prays that this Court grant this Petition for *Certiorari*.

Respectfully submitted,

Walter P. Maksym, Esq.
Attorney for Petitioners

Dated: January 29, 1997

APPENDIX A

First Appellate District Division Four, No. A068505

In The Supreme Court of California

COUNTY OF CONTRA COSTA,

Appellant,

vs.

HUMORE INC., et.al,,

Appellants.

FILED: August 21, 1996

Robert Wandruff, Clerk
H. Cruz
Deputy

Petition for Review is denied.

GEORGE
Chief Justice

1

APPENDIX B

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

CONTRA COSTA COUNTY,

Plaintiff and Appellant,

v. A06850
(Contra Costa County
HUMORE, INC., et al., Super. Ct. No. C92-05522)

Defendants and Appellants

In this action for injunctive and declaratory relief, both parties have appealed the judgment (1) granting in part defendants motion for judgment pursuant to Code of Civil Procedure 2 section 631.8; (2) issuing a permanent injunction to prohibit Owners from (a) allowing individuals to live in tents on their property or (b) erecting tents for such purpose; and (3) declaring that the maintenance of tents for living purposes within residential zoning districts violates the Contra Costa County Ordinance Code and constitutes a public

nuisance. We affirm the judgment enjoining maintenance of tents for occupancy on all parcels except parcel 169-200-001. We reverse the judgment dismissing certain defendants and the claims alleging illegal use of the property for commercial, junkyard and storage purposes.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II. 1 Defendants below were Lafayette Morehouse, Inc. (Morehouse); The Private Sector, Inc.; Alexander and Jacqueline Van Sinderen; Tom Wagner; Lilyan Binder; Robert F. Kerr; Humore, Inc., and Victor Baranco (collectively, defendants). Appellants herein are Humore, Inc., and Victor Baranco (hereafter, Owners). 2 Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

I. FACTS AND PROCEDURE

A. Background

The property in question consists of six contiguous parcels located in an unincorporated. 23-acre area of Contra Costa County (County). All of the parcels are zoned-for single-family dwellings, in either the R-10 or R-20 residential districts.

Victor and Susan Baranco originally acquired the property. Alexander Van Sinderen has lived there since l 971. Van Sinderen was joined by a group of individuals who began living together on the property as a community in which each resident had a ' no-vote" to

stop any proposed group action. They discussed inviting homeless people to stay on the property. Ultimately, the community made the unanimous choice to open the property up to homeless "guests." It was these guests who erected the first tents on the property. When they "ran out of room indoors," the community permitted the Guests" to use tents.

At some point ownership of the property transferred to Humore, Inc.; Baranco retained a life estate in several of the parcels. Humore, Inc., is a land holding corporation that holds title to the property for the member of that group that reside there and who identify themselves as Morehouse. Morehouse is actually a nonprofit corporation that leases ail the property from Humore, Inc. Van Sinderen has been President of Morehouse since its incorporation and is also an officer of Humore, Inc. Lilyan Binder, also an original resident, is President of Humore, Inc., and an employee of Morehouse.

In March 1992 James Hall, zoning investigator for the County received a complaint regarding possible zoning violations on the property. Additional complaints were received through 1994. Hall made numerous visits to the site. Neighbors whose property overlooked Owners' property noticed permanent tents there as well as tents that would be put up in the afternoon or evening; campfires; people living in and around the tents and sitting on stools outside the tents; and lanterns in the tents. One neighbor noted that she observed these conditions "every day."

Investigator Hall conducted several off-site inspections beginning in June 1992. He observed people living in white frame tents (dimensions approximately 14 x 14 feet) and smaller, domed tents; vehicles that appeared to be abandoned, dismantled or otherwise inoperable; outdoor stored material and storage structures; cardboard boxes and pallets; and a food storage area associated with lots of activity.

B. The Administrative Search

In October 1992 Hall sought an inspection warrant to further investigate the alleged zoning violations. In his affidavit Hall recited that he had received complaints from neighbors about people living in the tents, with the associated noise, disturbances and substantial additional traffic. Further, he had observed people moving in and out of tents, a mattress leaning against a tree, clothing hanging next to tents, and food packing crates. Hall wanted to inspect the premises, including the interior of the tents, believing an inspection would reveal people actually living and sleeping in tents and engaging in commercial activities, in violation of the zoning ordinance.

Upon issuance of the warrant, Hall and others inspected the property. While onsite Hall saw tents, some with wooden floors and frames; cots built into tents; a built in wall unit; tents with furniture and personal items (clothing, sleeping bags, comforter, footlocker, radio, magazines, food, a cooler); and people sleeping in tents. One tent contained a waterbed. As well, Hall saw inoperable vehicles and car parts; piles of scrap metal and scrap wood and building materials; stored

food, people processing food, plus a building full of canned cranberry sauce; several 55 gallon drums; and an outhouse.

C. Procedural History

That November, County filed its complaint for injunctive and declaratory relief, alleging that defendants were maintaining tent residences; a food packaging, warehousing and distribution center and facilities; a junkyard; a storage yard; a contractors' yard; and abandoned vehicles.

At trial the court heard defendants' suppression motion in limine and ultimately suppressed all evidence found during the October search on grounds that Hall had failed to inform the court issuing the warrant that County officials had already toured and inspected the property in April and concluded that no zoning violations existed. At the close of the County's case, upon defendants' motion for judgment, the court dismissed (1) all defendants except Humore, Inc., and Victor Baranco; (2) all claims except those relating to tents and junkyards; and (3) those claims as to certain lots.

After trial the court declared that the use of tents as dwellings was illegal and enjoined Owners from maintaining such uses. Both parties have appealed.

II. OWNERS' APPEAL*

A. The Ordinances as Applied and Enforced Do Not Infringe Owners' Substantial Rights

Owners level a shotgun smattering of natural law and

state and federal constitutional attacks against the judgment. None are availing.

(1) There is no Flaunting of City of Santa Barbara v. Adamson

Owners first contend that in enforcing the zoning ordinances against them, the County inappropriately applied a legally outdated subjective notion of nuclear family 'normalcy' ...." They claim the County ignored the teaching of City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 131-134, which declared that a zoning ordinance which defined "family" in such a way as to distinguish between related and unrelated persons disrespected the right of privacy guaranteed by the California Constitution.

The County zoning ordinance in question embodies a nearly identical definition of family," one which has not been amended to reflect the Santa Barbara holding. (County Ord. Code § 82-4.236) However, the injunction was neither sought nor secured under this ordinance. Rather, the provisions at issue relate to the uses allowed in the R- 10 and R-20 districts. In these districts, the following use is allowed: "(1) A detached single family dwelling on each lot and the accessory structures and uses normally auxiliary to it. ' (County Ord. Code, §§ 84-4.402; 84 14.402.) The County Ordinance Code further provides that no land in the unincorporated area shall be used for any purpose not otherwise permitted, and that any use contrary to the allowable zoning uses is unlawful and a public nuisance. (County Ord. Code, § 82-2.006.) No provision in the code pertinent to the issue at hand permits the use of tents as permanent or

semipermanent dwellings in residential districts.

* See footnote ante, page 1: 3 The ordinance defined "family" as an individual or two or more persons related by blood, marriage or legal adoption, or a group not exceeding five other persons.

The trial court concluded that the use restriction was "unambiguous and prevents the maintenance and use of tents for continuing occupation." Contrary to their assertions, as construed and enforced this restriction does not invade Owners' associational or privacy rights or the right to pursue happiness; or subvert their right to exercise liberty of conscience; or prevent them from living with more than five nonrelated people. It does not govern with whom Owners can reside, associate or share meals, whom they can entertain, or to whom they can rent or at what prices. Rather, the provisions in question govern use and restrict the above activities only by mandating that they take place within a detached single-family dwelling or structures accessory and normally auxiliary to such a dwelling.

It is just this kind of use restriction which the court in City of Santa Barbara v. Damson, supra, 27 Cal.3d 123 reckoned was less intrusive than a "rule-of-five" definition of "family." Indeed, the court pointed out that the goals underlying the residential zoning ordinance in question, including the goals of preserving a residential environment and sustaining a suitable family environment, could be achieved by less restrictive means, e.g., by restrictions on transient and institutional uses such as hotels, motels and boarding houses, and floor space and facilities restrictions. (Id., at p. 133, italics

omitted.): In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users." (Ibid.) For all these reasons, we conclude there was no flaunting of Santa Barbara in this case.

(2) The Ordinance is Not Void for Vagueness

Next, Owners urge that the zoning ordinance is facially unconstitutional because it is so vague that it allows County officials unfettered discretion in deciding what is "normal." "' [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process.'" (Ewing v. City of Carmel-by-the-Sea (Ewing) (1991) 234 Cal.App.3d 1579, 1594, quoting Connally v. General Const. Co. (1926) 269 U.S. 385, 391.) However, "a substantial amount of vagueness is permitted in California zoning ordinances: '[I]n California, the most general zoning standards are usually deemed sufficient.... "California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies if the comunity's zoning business is to be done without paralyzing the legislative process."'" (Novi v. City of Pacifica (1985) 169 Cal.App.3d 678, 682.)

Under these standards, the ordinance is not unconstitutionally vague. First, the permitted use in question is the "accessory structures and uses" that are "normally auxiliary" to a detached single-family dwelling. The key concept here is the single family residence. The

accessory structures and uses are permitted only to the extent they are "normally auxiliary to" such a residence. "Auxiliary" means "offering or providing help"; "functioning in a subsidiary capacity." (Webster's Ninth New Collegiate Dict. (1984) p. 118.) That which is "normal conforms "to a type, standard, or regular pattern." (Id., at p. 806.) Further, the ordinance itself defines "accessory use" as "a use incidental and accessory to the principal use of a lot, or a use accessory to the principal use of a building located on the same lot." (County Ord. Code, § 82-4.278.)

These terms, applied with a little common sense to the concept of a detached single-family dwelling, provide sufficient guidance for evaluating what is a permissible use under the ordinance. In the words of the trial court: "While the use of 'backyard tents' for slumber parties, a wedding reception or even by an occasional overnight guest might be determined to be a use normally auxiliary to a detached single-family home, by no stretch of the imagination is the maintenance of tents as full-time living quarters such a use." We agree. The maintenance of tents for permanent or semi-permanent dwellings is not "incidental to," and does not "provide help" for the function of, a detached sinle family dwelling. Nor does maintenance of tents for such a purpose serve in a "subsidiary capacity" to the function of single-family home or "conform to the type, standard or regular pattern" of uses associated with single-family homes.

(3) Application of the Nuisance Per Se Doctrine Did Not Violate Owners' Due Process Rights

Owners also attack, from several angles, the

fundamental workings of the nuisance per se concept. When the Legislature declares certain acts, conduct or uses of property to be a public nuisance, such acts, conduct or uses are nuisances per se. (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 133, pp. 814-815.) "Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved." (McClatchy v. Laguna Lands Limited (1917) 32 Cal.App. 718, 725.)

Owners contend that their ' right of confrontation" and "opportunity to contest the facts and presumptions" is infringed by a legal process which declares a finding of a residential zoning violation to constitute a public nuisance, enjoinable without proof of the injurious nature of the activity or conduct. Owners' quarrel is with the legislative police power itself, which our constitution reserves to municipalities with respect to land use and other local ordinances and regulations not in conflict with the general laws. (Cal. Const., art. XI, § 7.)

Maintaining the character of residential neighborhoods is a proper purpose of zoning and a proper exercise of the police power. (Euclid v. Ambler Co. (1926) 272 U.S. 365, 395; Ewing, supra, 234 Cal.App.3d at pp. 1587, 1590.) Courts will not declare a zoning ordinance unconstitutional unless the provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." (Euclid, supra, 272 U.S. at p. 395; Ewing, supra, 234 Cal.App.4th at pp. 1591 1592.) Against this test, Owners' due process challenge fails. The restrictions on use are reasonable because they are substantially related to the general purpose of

maintaining the character of the district as dedicated to detached, single-family residences. (See Euclid., supra, 272 U.S. 395; Ewing, supra, 234 Cal.App.3d at p. 1587.)

In a related vein, we also reject Owners' challenge that County's "overly broad construction" and application of the ordinances deprives them of their property without due process of law. A law is overbroad if it reaches constitutionally protected conduct. (Grayned v. City of Rockford (1972) 408 U.S. 104, 114.) First, as we have explained, the ordinances as construed by the court below and by this court are within the County's police power and do not invade Owners' substantial rights. There is no overbreadth problem. Second, a zoning ordinance does not amount to a taking just because, as here, it narrows a property owner's options. (Ewing, supra, 234 Cal.App.3d at p. 1592.) Owners' claim of deprivation is devoid of any evidence of diminution in value and must fail.

(4) Owners Do Not Have An Equal Protection Claim

Owners claim that the "evidence at trial" revealed a deliberate policy of selective enforcement of County ordinances directed against them "which is prima facie discriminatory and invalid under the Equal Protection Clause...." They further assert that a classification based on "nonconformity" is "suspect" and that the selective enforcement for nonconformity in the use of their property amounted to harassment.

These arguments are specious. First, there was no evidence of selective enforcement presented. There was no evidence of other property owners who were maintaining tents for continuous occupation in

at 134.) The Adamson decision expanded the concept of a "normal" household, including the number of its guests. The testimony of defendants' witnesses is undisputed that allowing otherwise homeless people to sleep in tents on the subject property is a normal use of that property for twenty-two years prior to the filing of this suit. (RT at 505-510, 549, 554-555, 563-564, 605, 610.)

With California having adopted "vagueness" as the absurd and nondescript "standard", should the Court of Appeals decision be permitted to stand, the danger lurks that it's government can henceforth, at all times and under all circumstances, capriciously determine the core of an owners property value and use by bureaucratic fiat. James Otis reminded us in 1761 in his historic and famous argument to the Boston Court that: "'the freedom of one's house' is an essential liberty, that a man in his home must be as secure as a prince in his castle,' that a law which violates that privacy is an instrument of 'slavery' and villainy.'" (An Almanac of Liberty by William O. Douglas, 1954, Doubleday and Company, p. 247.)

The Code, as interpreted by the County and Court of Appeal lacks compatibility with the General Plan and state statue which require that the housing element must contain "adequate provision for the housing needs of all economic segments of the community." (Emphasis added; Government Code section 65583(c); see also: So. Burlington City NAACP v. Township of Mount Laurel, 336 A2d 713 (N.J. 1975). The Ordinance Code, as so enforced, does not address the needs of the lowest and most endangered economic segment of the County. There is literally no place for homeless people to live in Contra Costa County. The R-10 and R-20 districts permit livestock on the grounds, but not human guests, according to the Court of Appeal's interpretation of the Code. Livestock may present a health hazard, but the County inspectors found absolutely no health problem on the subject property or in connection with defendants' human guests. (AA 127-128.) Further, there is no

dispute at issue whether the subject property is being used for other than residential use. The County investigators found that the few tents were used only for sleeping and that showers and toilets are available in the existing buildings. (AA at 127-128.) There is no evidence in the record that the tents are used for "permanent dwellings," as stated by the Court of Appeal. (Exhibit A, p. 7.) Objectively and specifically, this residential use is not prohibited by the County Code.

The trial court took judicial notice of the severe crisis of homelessness in the nation and the County and the lack of any available shelter for a significant segment of the population. (RT 29-30.) Certainly these defendants' property rights allow them to do good works in the privacy of their home with their surplus property, including, in the absence of specific prohibition, providing for a handful of their homeless County neighbors who have nowhere else to go, where the County has made no provision even though charged with the duty to do so. In effect the County and the appellate court have effectively, without standards and specific legal basis, *ad hoc*, "outlawed" and excluded the poor and homeless in California as a "nuisance".

All laws are reactionary in that they are intended to regulate already occurring conduct. For example, there would not be laws against murder if no one had ever been murdered. The defendants' compassionate use of their surplus property for provision for their homeless neighbors was never contemplated when the zoning ordinances were enacted. Society did not experience this breakdown until the 1980's, a situation foreign to and denied by the pre-Adamson mentality demonstrated by the County in this action.

The Superior Court found that there is a "conclusive presumption" that any violation of a zoning ordinance is a nuisance per se and results in irreparable injury to the health, safety and welfare of the people of the County. (AA at 204.) However, "absent a clear showing that the ordinance is being violated, the

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Court must weigh the relative harm to the defendant if the injunction is issued as against the harm to the plaintiff if it is not issued: that only when the harm to the plaintiff outweighs the harm to the defendant should the injunction issue. Stated otherwise, it is only upon a clear showing that the zoning ordinance is being violated that a conclusive presumption of irreparable injury to the public arises so as to justify the injunction without balancing the relative and harm to the parties." People v. Synanon Foundation, Inc., 88 Cal. App. 3d 304, 309 (1979).

The County did not make a clear showing of zoning violations. The County cannot clearly establish zoning violations in situation where County Staff Reports recommended to the Board of Supervisors, after inspection of the subject property, that there were no zoning violations, and where there is no mention of nor prohibition against tents in the County Code. The County apparently relied on the notion of "conclusive presumption" because it could not and did not prove nuisance or irreparable injury. There was no evidence presented by County on the issues of nuisance or irreparable injury.

"The rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof." United States v. Provident Trust Co., 291 U.S. 272, 281-282 (1934). "Conclusive presumptions" are strongly disfavored and were rejected by this Court in 1870: "It is a doctrine not to be tolerated in this country that municipal corporation...can, by its mere declaration that it is one [a nuisance], subject to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, a the uncontrolled will of the temporary local authorities." (Yates v. Milwaukee, 77 U.S. 497, 505 (1870); see also McQuillan, Municipal Corporations, Section 24.66.) Other cases have also rejected the notion of conclusive presumption:

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"[T]he Court shall fashion the relief that is 'proper and suitable' for each case. Thus a municipality may not, by ordinance, fashion that relief in advance." People ex rel. Camil v. Buena Vista Cinema, 57 Cal. App. 3d 497, 502-3 (1976).

"Although it is elementary that an owner of property has no constitutional right to maintain it as a public nuisance, it is equally elementary that he has a clear constitutional right to have it determined by due process whether in fact and law it is such a nuisance. As against this right no ex parte declaration, however formal, by municipal authorities that it is a nuisance final as against him." Leppo v. City of Petaluma, 20 Cal. App. 3d 711, 717 (1971). "[T]he mere recitation in an ordinance that the "general welfare" or the "health, safety, and morals" of the community require this ordinance is not binding upon this Court. We are warranted in going behind this recitation and examining what the evidence, in fact, is." Anderson v. Town of Forest Park, Oklahoma, 239 F.Supp. 576, 582 (1965).

"In strictness there cannot be such a thing as a 'conclusive presumption'" (Wigmore, Evidence, Section 2492.) The non-nuclear household is protected by due process considerations. The United States Supreme Court: "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." Moore v. City of East Cleveland Ohio, 431 U.S. 494, 499, 504 (1977). Concurring in Moore, Justice Brennan stated:

"In today's America, the "nuclear family" is the pattern so often found in white suburbia. . . . The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The extended family that provided generations of early Americans with social services and economic and emotional support

in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goal of brutal economic necessity, prominent pattern virtually a means of survival for large numbers of the poor and deprived minorities of society. For them compelled pooling of scant resources requires compelled sharing of a household." Moore, supra, 431 U.S. at 508.

In Zablocki v. Redhail, 434 U.S. 374 (1978), this Court ruled that if a requirement imposed by a State "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." The Constitution imposes on this Court the obligation to "examine carefully ... the extent to which [the legitimate government interests advanced] are served by the challenged regulation." Moore, supra, 431 U.S. At 499. See also Carey v. Population Services International, 431 U.S. 678 (1977) (invalidating a requirement that bore "no relation to the State's interest"). An evidentiary rule, just as a substantive prohibition, must meet these standards if it significantly burdens a fundamental liberty interest. Fundamental rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. Little Rock, 361 U.S. 516, 523 (1960).

The County and the Court of Appeals simultaneously stretched and ignored the law to restrict a natural property right which is not expressly prohibited by the Code. Reliance upon an amorphous vagueness doctrine assures the result which can only be exercised in favor of government whim and unfettered discretion. The Bill of Rights and the Fourteenth Amendment were intend to protect the little individual precisely from this unbridled governmental power. The modern approach to equal protection analysis further requires the County to demonstrate a compelling interest for it's infringement of a "fundamental interest" or discriminatory action involving a "suspect classification." Several recognized "fundamental interests"

and "suspect classifications" are involved here although no hint of a "compelling interest" has been alluded to by the County. Legislative enactments which involve "fundamental rights" or "suspect classifications" must be narrowly drawn to express only the legitimate state interests at stake, i.e., it must be the least burdensome alternative available. Roe v. Wade, 410 U.S. 113, 155 (1973). With the further constitutional recognition given to biologically unrelated groups by the California Supreme Court in Adamson, supra, 27 Cal. 3d 134, there can be no doubt that defendants' group should receive constitutional protection which the County may not violate through arbitrary enforcement of its zoning ordinance. It is a "normal activity" of families to host guests on their roperty as an expression of personal liberty which is guaranteed by the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendment to the United States Constitution.

II. THE COURT OF APPEAL'S DECISION DENIES DEFENDANTS EQUAL PROTECTION OF THE LAWS BY UPHOLDING A CONSTRUCTION AND ENFORCEMENT OF A ZONING ORDINANCE WHICH PROHIBITS A USE FOR HUMAN SURVIVAL WHICH WOULD BE ALLOWED FOR RECREATION OR THE LIVESTOCK.

The landmark decision applying Fourteenth Amendment equal protection principles to the discriminatory enforcement of the law by administrative or executive officials is Yick Wo v. Hopkins,118 U.S. 356 (1886) (. . . "[t]hough the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at 373, 374.)

The evidence at trial in the present action showed that there has been a deliberate policy of selective enforcement of County

Admitted into evidence was County's exhibit 9 — defendants' responses to requests for admission and interrogatories. That exhibit established certain key facts, namely, that (1) Morehouse, as lessee of a portion of the property, had partial control over several parcels thereof; (2) Alexander Van Sinderen was President, and an employee, of Morehouse; (3) Lilyan Binder was President of Humore, Inc.; and (4) Jacqueline Van Sinderen was an employee of Morehouse. This constituted substantial, uncontroverted evidence of a connection between these four defendants and the subject property that was before the court at the time it ruled on defendants' motion.

Owners point out that County did not argue the applicability of exhibit 9 when the court heard the motion. Therefore, they urge that County invited any error the court might have committed in ignoring that evidence and "waived" the matter by not raisins it below. The doctrine of invited error estops a party from asserting as error a judicial action induced by his or her affirmative action or objection. (See 9 Witkin, Cal.Procedure (3d ed. 1985) Appeal, §§ 301-303, pp. 313 315; Horsemen's Benevolent & Protective Assn. v. Valley Racing Assoc. (1992) 4 Cal.App.4th 153 8, 1555-1556.)

The notions of waiver and invited error do not bear on the evidentiary basis for the court's section 631.8 judgment. First, County did not "waive" the applicability of exhibit 9 because it was properly admitted into evidence. Second, while County may have been represented by unprepared counsel who was unfamiliar with crucial particulars of the record and

exhibits, it was the court's job under section 631.8 to "weigh the evidence." This means all the evidence pertinent to certain parties and parcels, not just the evidence which the parties selectively brought to the court's attention when arguing the motion. Exhibit 9 unequivocally establishes the involvement of Morehouse, the Van Sinderens and Binder to the case and to the property. The court erred in dismissing them.

However, it properly dismissed The Private Sector, Inc. County offered no evidence demonstrating that this corporation had any ownership interest in, or control over, the subject property.

B. The Court's Rulings on the Validity of the Administrative Inspection Warrant and Supporting Affidavit Were Erroneous

(1) Background

(a) Statutory Authority

Government Code section 65105 authorizes local planning agency personnel, in "the performance of their functions," to ' enter upon any land and make examinations and surveys," provided that the surveys, etc., do not interfere with use of the land by its lawful occupants. Section 1822.50 et seq. governs administrative inspection warrants. An inspection warrant by definition is "an order, in writing, in the name of the people, signed by a judge . . ., directed to a state or local of official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to . . . zoning." (§ 1822.50, italics added.) Under section 1822.51, an inspection warrant

will issue only "upon cause, unless some other provision of state or federal law makes another standard applicable. An inspection warrant shall be supported by an affidavit, particulrly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made." Cause is deemed to exist "if . . . there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises ...." (§ 1822.52.)

(b) Rulings Below

Defendants filed an in limine motion to exclude all evidence gathered during execution of the inspection warrant, citing multiple grounds, including that the inspection exceeded the scope of the warrant and that the affidavit lacked particularity. The court ruled that the affidavit was sufficient to search the tents, but "too vague and also insufficient" with respect to the other violations.

In particular, the affidavit alluded to complaints" that the owners and occupants of the property were conducting "a food storage and distribution operation" and had "converted single family dwellings to such use ...." Inspector Hall, as affiant, noted that he had "observed large numbers of boxes and containers which appeared to be food packing crates and boxes" and saw people "engaged in moving and sorting a number of these boxes." The court found the allegations of food storage and distribution operations to be "very vague" and could encompass activities that did not violate the code. Further, the source of complaints was not identified and the attempted corroboration was insufficient to allow

one to believe that food storage and distributions operations were in progress and that single family dwellings had been converted to that use. From this the court determined that the language in the warrant permitting inspections of "structures on the property" other than tents should have been stricken. Accordingly, it granted defendants' motion to the extent of excluding any items found inside such structures.

Trial continued with testimony from Inspector Hall. Defense counsel began questioning Hall about internal memoranda, the contents of which the defense claimed should have been made available to the judge who issued the warrant. These documents showed that in May 1992, County personnel knew that people were sleeping and living in tents on the property,7 yet Hall, in his October 1992 affidavit, stated that he believed "that an inspection of the interior of the tents will reveal that people are actually living and sleeping in the tents in violation of the uses allowed ...." The court framed the question this way: "[W]hy should a warrant be issued so the County could find out what they already know?"

The court ended up suppressing all evidence seized as a result of the October search, as well as all evidence pertaining to what Hall observed during that search. The court explained it was "not suggesting that anyone intentionally withheld information or that any one was intentionally being dishonest; but the fact of the matter is that Judge Westover was led to believe that the only evidence that would corroborate complaints from neighbors was the evidence that was received by investigators standing outside the property. [I] Faced with that, Judge Westover certainly was justified in

making a finding that there was cause to go on the property to see if there was additional evidence that would support the county bringing the complaint. [11] [I]n fact, if Judge Westover knew the information, he would have been aware that the off-site inspections followed an onsite inspection, and the Judge probably would have concluded . . . that there was already enough information that would support filing the complaint and there no longer was a need for the serious intrusion of a search. [11] . . . And in this situation, the intrusion was not warranted."

7 As it turns out, there was a consensual search of the property in April 1992, with staff representatives from the building, zoning and health departments. Hall did not participate in the inspection, but knew it had occurred.

2. Analysis

(a) The Warrant Was Not Overbroad

The particular zoning violations which Inspector Hall identified in the affidavit were "use of tents to house people on a continuing basis" and "conversion of single family dwellings into structures used for commercial purposes, including the storage, packaging, distribution, and warehousing of large quantities of food supplies." The court concluded that the affidavit was not sufficient to establish cause of violations other than those related to maintaining tents for continuous occupation and, therefore, the warrant was overbroad in permitting searches of structures other than tents.

The order issuing a warrant in a criminal case may be set aside only if the affidavit, as a matter of law,

does not establish probable cause." On review, we apply the same standard governing the trial court in determining a motion to suppress. (See People v. Campa (1984) 36 Cal.3d 870, 878, on standard of review on motion to suppress.) On the other hand, we must defer to the issuing court's factual findings, express or implied. (See People v. Glaser (1995) 11 Cal.4th 354, 362, on standard of review of ruling on a motion to suppress.)

Federal circuit courts with respect to "OSHA" violations have uniformly applied a lesser standard of administrative probable cause than the standard applicable to investigation of criminal conduct. (Salwasser Manufacturing Co. v. Occupational Saf: & Health Appeals Bd. (1989) 214 Cal.App.3d 625, 630.) "It is the primary object of the search which determines what type of probable cause showing is required." (Id., at p. 7631; Michigan v. Clifford (1984) 464 U.S. 287, 294.) The Fifth District has adopted the federal "OSHA" standard of"administrative probable cause" for "Cal-OSHA" inspections even though the latter could ultimately result in a criminal investigation (unlike federal "OSHA"). (Salwasser, supra, 214 Cal.App.3d 625.)

Recognizing that evidence to establish administrative probable cause is less than that needed to show a probability of a violation, the Fifth District has concluded that the following satisfies the Fourth Amendment probable cause mandate: ""the proposed inspection is based upon a reasonable belief that a violation has been oris being committed.... This requirement is met by a showing of specific evidence sufficient to support a reasonable suspicion of a violation. "" (Salwasser, Sara, 214 Cal.App.3d at p. 631.)

Thus, for example, in testing whether there is administrative probable cause to issue a "Cal-OSHA" inspection warrant based on employee complaints, there must be some basis for believing that complaints were actually made, that the complainants were sincere in asserting that a violation existed, and that they had some plausible basis for entering a complaint. A conclusory statement in the warrant application that employee complaints have been received, without more, is insufficient to establish probable cause. (Ibid.) We agree with this reasoning.

Applying this standard, the warrant application herein was sufficient to support a reasonable suspicion of a violation based on conversion of single-family dwellings into structures for storage, packaging, distribution and warehousing of food supplies. We note first that the warrant was properly tailored to the alleged violations, permitting only a limited search of single-family dwellings: the warrant excluded a search of the interior of any such dwelling, once it was established by view of the interior of such structure from the doorway that it was being used as a single-family residential dwelling.

Second, the affidavit states that Hall received "complaints" that the owners and occupants of the property were conducting a food storage and distribution operation and had converted the single-family dwellings to that purpose. Earlier, the complainants were identified as "neighbors" and "residents of the area." These are citizen complainants who, it can be inferred, related their personal observations to Inspector Hall. Thus, although they were not further identified and the complaints themselves were reported in conclusory

fashion, their reliability is not in question. (See People v. Lombera (1989) 210 Cal.App.3d 29, 32.)

Third, there was some corroboration of the neighbors' conclusory complaints. The affidavit identified The Private Sector, Inc., as sharing operation and control of the property with Morehouse. Hall related his conversation with the director of The Private Sector, Inc., to the effect that the organization provides shelter and meals at no cost to people. The reasonable inference from this statement is that meal preparation is occurring on the subject property. Then, one neighbor, identified by name, provided Hall with a traffic survey that showed approximately 25 people per hour were entering or exiting the property. While the dates and times are not provided, this information does indicate substantial traffic which, coupled with The Private Sector's mission, supports an inference that significant numbers of people were coming for shelter and food.

Fourth, Hall related his personal observations of large numbers of what appeared to be food packing crates and boxes, as well as people moving and sorting these boxes. Standing alone, perhaps, these observations would be too vague to justify the warrant. However, under the totality of the circumstances, including solid information that people were living in tents on the property, The Private Sector's presence and purpose on the property, the volume of people coming to the property, and neighbor complaints of residences converted to food storage and distribution operations, the affidavit was sufficient to support a reasonable suspicion of ongoing violations related to such conversion.

(b) The Negligent Omission Did Not Invalidate the Warrant

County also asserts that the court erred in invalidating the warrant on the ground that the affidavit omitted information relating to the prior consensual search. County is correct, for two reasons.

First, we must distinguish between an administrative search pursuant to legislative or administrative standards for a routine or area inspection and a search based on specific evidence of a violation. In both cases, reasonableness is the ultimate test for determining probable cause. This test involves balancing the need to search against the invasion which the search engenders. (Camara v. Municipal Court (1967) 387 U.S. 523, 537, 539.) In the context of routine, periodic area inspections pursuant to a municipal enforcement program, the search will be reasonable and, thus, probable cause will be found to issue a warrant where reasonable legislative or administrative standards for conducting the area inspection are satisfied with respect to the particular premises inspected. These standards could be based on passage of time, the nature of the property, or condition of the entire area, etc. (Id., at p. 538.)

On the other hand, when the warrant affidavit is grounded on specific evidence of a violation, "'there must be some plausible basis for believing that a violation is likely to be found. The facts offered must be sufficient to warrant further investigation or testing.'" (Salwasser Manufacturing Co. v. Occupational Sag: & Health Appeals Bd., Sara, 214 Cal.App.3d at p. 631, original

italics.) Knowledge that a prior on-site inspection revealed that people were living in tents might have been relevant to the probable cause analysis for an area inspection, because the timing of the prior search could go to the reasonableness of the standards for conducting the area search. However, we are talking about probable cause based on specific evidence of a violation. What must be shown is a reasonable suspicion of a violation. Whereas, the fact that five or six months earlier the County had searched the premises and found evidence of occupied tents might enhance the possibility that a current violation existed, knowledge of that fact would certainly not diminish the existence of probable cause; thus, its omission was immaterial.

However, even if the omission were material, the court had no basis for invalidating the warrant. The court apparently based its decision on People v. Kurland (1980) 28 Cal.3d 376, and therein lies the problem.

Among other points, the court in Kurland held that under article 1, section 13 of the California Constitution and Penal Code sections 1538.5-1540, a criminal defendant can attack a facially valid search warrant affidavit on grounds that it is incomplete. (People v. Kurland, Sara, 28 Cal.3d at pp. 383-384.) Once the court reviewing an allegedly incomplete affidavit determines that the omissions are material, the court goes on to decide whether the omission was reasonable, negligent, or intentional/reckless. (Id, at pp. 387-390.) With a negligent omission, the reviewing court "adds [the omitted item] and retests" for probable cause; only if the affidavit is then deemed insufficient would suppression be the proper sanction. (Id., at pp. 388-389.)

With the adoption of article I, section 28(d) of the

California Constitution, we now apply federal standards in criminal cases to decide whether relevant evidence seized pursuant to a warrant must be excluded. Thus, as to criminal defendants, we look to Franks v. Delaware (1978) 438 U.S. 154 to ascertain the type of misstatements or omissions that are sanctionable under federal law. (People v. Luttenberger,(1990) 50 Cal.3d 1, 9.)

Acknowledging that a "flat ban on impeachment of veracity could denude the probable cause requirement of all real meaning," the high court held that a criminal defendant is constitutionally entitled to a postsearch evidentiary hearing where (1) "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and (2) "the allegedly false statement is necessary to the finding of probable cause." (Franks v. Delaware, supra, 438 U.S. at pp. 155-156, 168.) Under federal law and Franks, negligent misstatements or omissions cannot be challenged. (See Id., at p. 170; see People v. Lopez (1985) 173 Cal.App.3d 125, 135.)

To our knowledge, Kurland has never been applied to an administrative (i.e., civil) situation, let alone a zoning enforcement action. The lower court assumed, without more, that it did apply. Yet, just as courts have struggled to find the appropriate standard of administrative probable cause, so, too, questions arise as to the scope of a civil defendant's right, under the California Constitution, to impeach an administrative affidavit. Is it the same, less than, or greater than, the right afforded a criminal defendant?

At most, the civil defendant should be entitled to a Franks hearing upon a proper showing. Where, as here, there is a finding that the affiant did not intentionally withhold information and was not intentionally dishonest, the subfascial attack on the warrant should end.

The point of allowing any testing of the fabric of an affidavit is to bolster the accuracy of the neutral probable cause analysis and thereby minimize the risk of unreasonable invasions of privacy that by definition occur when the warrant is not backed by probable cause. "A misinforming affidavit hinders the magistrate's inference drawing powers and increases the likelihood that privacy will be invaded without probable cause." (People v. Kurland, supra, 28 Cal.3d at p. 383.)

A deliberate material omission amounts to an attempt to mislead the judicial officer examining the affidavit for probable cause and such attempts without question undermine the judicial process. However, when the affiant is merely negligent, it is not the judicial process itself that is at risk; it is the accuracy of the probable cause analysis.

In determining the extent of a civil defendant's state constitutional right to attack the veracity of a warrant affidavit and, in instances where probable cause is then found lacking, to enjoy the remedy of suppressed evidence, we run into conflicting values. (See People v. Kurland, supra, 28 Cal.3d at p. 385; see Franks v. Delaware, Sara, 438 U.S. at p. 677) We must strike a proper balance among several competing concerns. These

include practicality, accuracy and the policy of encouraging resort to the warrant process (see People v. Kurland, supra, 28 Cal.3d at p. 385), as well as the public interest in acting on a continuing violation or public nuisance (see Conservatorship of Susan T. (1994) 8 Cal.4th 1005, 1020). Permitting an inquiry into negligent omissions might improve administrative performance in the areas of producing quality affidavits and conducting presearch investigations, and these improvements might in turn enhance the accuracy of the probable cause determination. However, against these values must be weighed the administrative time and expense of the hearing itself and the fact that in the administrative context we are often faced not with the existence of a single act, but with a continuing violation sometimes deemed, as here, to constitute a public nuisance.

Finally, the statutes governing administrative warrants vest substantial discretion in the court to determine probable cause and provide special protections not present in the criminal context. First, as in the case of a criminal warrant application, the judge may examine the affiant and any other witness before satisfying him or herself that there are grounds to issue the warrant. Second, the civil warrant is less intrusive: the owner or occupant must be present—and forcible entry is prohibited—except upon express authorization to the contrary by the judge upon a reasonable showing; and, where prior consent has been sought and refused, notice that a warrant has issued must be given 24 hours before execution unless "immediate execution is reasonably necessary in the circumstances shown." (§ 1822.56.) These procedures are clear and not only mandate, but encourage resort to the warrant process and protect the

parties subject to the search. If the judge thinks the affidavit is thin, unclear, or missing details, he or she can always send the affiant back for further investigation.

For all these reasons, we conclude that the civil defendant must show more than mere negligence in attacking a facially valid administrative warrant. A showing of intentional or reckless conduct, on the order of Franks, should be the threshold. There was no such showing here and, thus, the court erred in suppressing evidence obtained and observed during the on-site search.

Without question this error was prejudicial because the suppressed evidence went to the dismissed claims of improper commercial, storage, and junkyard uses.

IIV. DISPOSITION

We affirm the judgment of permanent injunction against maintenance of tents for continuous dwelling as to all lots except parcel 169-200-001. We reverse the judgment dismissing defendants Morehouse, Alexander and Jacqueline Van Sinderen, and Lilyan Binder. We reverse the judgment dismissing claims of illegal commercial, storage and junkyard uses. Costs on appeal awarded to Contra Costa County.

Anderson, P.J.

We concur:

Poche, J.
Reardon, J.

APPENDIX C

FILED
1994 NOV-7 A 8:17

SUPERIOR COURT OF CALIFORNIA.
COUNTY OF CONTRA COSTA

COUNTY OF CONTRA COSTA
& political subdivision Of
the State of California,

Plaintiff,

No. C92-0522

vs.

JUDGMENT

LAFAYETTE MOREHOUSE, INC., a California corporation, HUMORE, INC., a California corporation, THE PRIVATE SECTOR, a California corporation, ALEXANDER VAN SINDEREN, JACQUELINE VAN SINDEREN, VICTOR W.BARANCO, TOM WAGNER, LILYAN BINDER, ROBERT F. KERR AND DOES 1-50,

Defendants.

This matter came and regularly for trial before this Court on May 23, 1994: trial was held May 24, 1994 through June 1, 1994. Plaintiff was represented by Victor J. Westman, County counsel, Diana J. Silver and Phillip S. Althoff, Deputy County Counsels. Defendants were represented by Richard W. Hyland and Walter Maksym.

Testimony having been given documents and other exhibits having been received into evidence and examined by the Court, arguments having been presented and closing arguments submitted in writing to the Court, and the Court having prepared and filed a tentative decision on August 12, 1994 and proposed statement of decision on September 9, 1994,

IT IS ORDERED that:

(1) Defendants' motion for judgment Pursuant to Code of Civil Procedure section 621.8 is granted as to all defendants except Humore, Inc. and Victor Baranco and as to all lots on the subject property except for APN's 169-190-004, 169-190-007, 169-200-003, and 169-200-001; Defendants' motion is denied regarding the issue of tents an APN's 169-190-004, 169-190-007, 169-200-003 and 169-200-001. Defendants' motion for judgment in denied as to the existence of the junkyard an PPN 169-190-002. Defendants' motion for judgment pursuant to Code of Civil Procedure 631.8 is granted as to the remaining allegations of the complaint regarding multiple dwelling units, non-accessory shelters, conversion of single family residences, food packaging and warehousing, storage yard, contractor's yard, and abandoned vehicles; defendants' motion is denied as to defendants Humor, Inc. and Victor Baranco.

(2) A permanent injunction shall issue prohibiting defendants Humor, Inc. and Victor Baranco from allowing individuals to live in tents on the subject property and prohibiting defendants from erecting or maintaining tents for such purpose on the subject property;

(3) the maintenance of tents for living purposes within an R-10 or R-20 district is a violation of the Contra Costa County Ordinance Code and constitutes a public nuisance;

(4) the issue of costs is reserved with determination of prevailing parties.

DATED: October 4, 1994

Robert M. McGrath
Robert M. McGrath
Judge of the Superior Court